

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

(1) J& K BODY SHOP, INC. An Oklahoma Corporation,)	
)	
)	
(2) BRYAN C. KEY, An individual Person,)	
Plaintiffs,)	Case 5: 11-cv-00077HE
)	
vs.)	
)	
)	
(1) UNIVSERSAL UNDERWRITERS INSURANCE CO., A Foreign Corporation)	Removed from the
)	District Court for
)	Oklahoma County
)	
)	Case No. CJ-2010-9986
(2) ZURICH AMERICAN INSURANCE CO., A Foreign Corporation)	
)	
)	
Defendants.)	

AMENDED COMPLAINT

COMES NOW Plaintiff, Bryan C. Key, and alleges the following:

JURISDICTION AND VENUE

- (1) Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Oklahoma, with its principal place of business in this state situated in Oklahoma County and authorized to transact and transacting business in this state as a body shop.
- (2) Plaintiff is the President and owner of J & K BODY SHOP, INC. J & K BODY SHOP, INC. is located at 4316 New Castle Road, Oklahoma City, OK 73119.
- (3) Universal Underwriters Insurance Co., is a company that transacts business in Oklahoma. Universal Underwriters Insurance Co. headquarters' office is located

at 7045 College Blvd., Overland Park, Kansas 66211.

(4) Zurich American Insurance Co. is a company that transacts business in Oklahoma. Zurich American Insurance Company headquarters' office is located at 1400 American Lane, Schaumburg, Illinois 60196. Zurich American Insurance Company and Universal Underwriters Insurance Co are foreign insurers according to O.S. 36 § 602, which states the following:

A foreign insurer is one formed under the laws of another state or government of another state or government of the United States.

Universal Underwriters Insurance Co. and Zurich American Insurance Co. transact business in Oklahoma according to O.S. § 404, which states the following:

The making of or proposing to make, as an insurer, an insurance contract.

FACTUAL BACKGROUND

(5). Paragraphs 1 through 4 are incorporated by reference.

(6). Plaintiff purchased insurance coverage from Universal Underwriters Insurance Company on or around April 1, 1997. Plaintiff faithfully paid insurance premiums to Universal Underwriters Insurance Company with the understanding that Universal Underwriters Insurance Company would operate in good faith when and if a claim arose. Zurich American Insurance Company subsequently incorporated Universal Underwriters Insurance Company as an affiliate of Zurich American Insurance Company. This incorporation made Zurich American Insurance Company responsible as well as Universal Underwriters Insurance Company obligated parties to the contracts made by Universal Underwriters Insurance Company prior to the incorporation.

(7) The insurance contract, that is the subject matter of this action, was executed and

performed within the State of Oklahoma. According to 36 O.S. § 102, insurance is defined as follows:

Insurance is a contract whereby one undertakes to indemnify another or to pay a specified amount upon determinable contingencies.

(8) Plaintiff carried business income continuation loss insurance with Universal Underwriters Insurance Company and Zurich American Insurance Company. Plaintiff's policy number with Underwriters Insurance Company and Zurich American Insurance Company is as follows: UN69228445 hereinafter referred to as "the policy" on the Plaintiff's business.

(9) On or about May 17, 2009, a burglary was committed at J & K Body Shop while the policy was issued; and the insurance took effect and at all times since to and including the loss as herein alleged occurred, Plaintiff was the owner of the property described in the policy. By reason thereof, under the terms of the policy, Plaintiff became entitled to receive from Defendants and Defendants became obligated to pay to Plaintiff \$121,360.79, the decreased gross business income for May, 2009, through October, 2009, according to Edward Havrilla, Plaintiff's Certified Public Accountant.

Gross income for May, 2008 through October, 2008 was \$293,094.59. Gross income for May, 2009 through October, 2009 was \$171,733.80. The decrease in gross income was \$121,360.79.

(10) Plaintiff timely filed a claim with Defendants after the, May 17, 2009, burglary. The claim number is as follows: 5330021670. Plaintiff demanded that Defendants pay the sum of \$121,360.79 as alleged in paragraph 8 above, but Defendants failed and refused, and continues to fail and refuse to pay Plaintiff that sum or any part of it; and there is now due and owing from Defendants to Plaintiff the sum of \$121,360.79. Defendants acted in bad faith and failed to resolve Plaintiff's claim.

**CLAIM FOR RELIEF – BREACH OF THE IMPLIED DUTY TO DEAL
FAIRLY AND IN GOOD FAITH**

(11) Paragraphs 1 through 10 are incorporated by reference.

(12) Defendants' failure to pay the \$121,350.79 is an act of bad faith and is a breach of contract, tortuous and maliciously, oppressively, and fraudulently tortuous and maliciously, oppressively, and fraudulently tortuous toward the Plaintiff. As a proximate result of Defendants' failure and refusal as herein alleged, Plaintiff has been damaged in the sum of \$121, 350.79, the amount due under his policy and remains unpaid.

(13) The acts of Defendants alleged in Paragraph 9, above were done in bad faith and were maliciously and oppressively, and fraudulently tortuous toward the Plaintiff.

Defendants' failure to pay the Plaintiff the sum of \$121,360.79 has resulted in an economic hardship for the Plaintiff. Plaintiff is the weaker party in the bargaining process. Plaintiff is therefore entitled to exemplary or punitive damages. In *Embry v.*

Innovative Aftermarket Systems, 2010 OK 82, the Supreme Court of the State of

Oklahoma, decided November 23, 2010, the court stated the following:

The special relationship that gives rise to tort liability for bad faith is marked by (1) a disparity in bargaining power where the weaker party has no choice of terms, also called an adhesion contract, and (2) the elimination of risk. *Rogers vs. Tecumseh Bank*, 1988 OK 36 ¶¶ 14-16, 756 P.2d 1223, 1226. Tort liability is allowed in these types of contracts, because bad faith, or, more properly, breach of the implied duty to deal fairly and good faith, precipitates the precise economic hardship the contract was intended to avoid. *Christian vs. American Home Assurance Co.*, 1977 OK 141, 577 P.2d 899.

14. **Wherefore**, Plaintiff prays judgment against Defendant as follows:

1. For the sum of \$121,360.79, benefit payable under policy
2. For Plaintiff's attorney fees and costs of suit herein incurred; and
3. For punitive damages of \$10,000.00 for acting in bad faith.
4. For such other and further relief as the court may deem proper.

Respectfully submitted,

s/ Eunice R. Wimberly
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Oklahoma City, OK 73101
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Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that, on the day of April 29, 2011, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants and by U.S. Mail to:

William D. Perrine, OBA # 11955
1437 S. Boulder Ave., Suite 620
P.O. Box 1710
Tulsa, OK 74101-1710

Counsel for Defendant
Zurich American Insurance Company

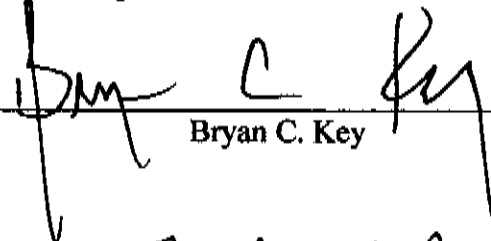
Via U.S. Mail
Kim Holland
Insurance Commissioner
P.O. Box 53408
Oklahoma City, OK 73152-3408

s/ Eunice R. Wimberly
Eunice R. Wimberly

VERIFICATION

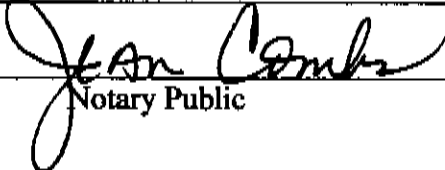
STATE OF OKLAHOMA)
)ss.
COUNTY OF OKLAHOMA)

I, Bryan C. Key, of lawful age and being first duly sworn upon oath, states: I am Bryan C. Key. I have read the Amended Complaint and state that all statements contained therein are true and correct.


Bryan C. Key

Subscribed to and sworn to before me on 21st day of April 2011

My Commission expires on 12-17-2014

Commission #: 02020556

Notary Public

